STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | MILWAUKEE COUNTY

BRIAN YOUNG,
BRADLEY JOHNSON,

Petitioners,

v.

CITY OF MILWAUKEE BOARD OF FIRE AND POLICE COMMISSIONERS,

Respondents.

Case No: 18-CV-1190

DECISION AND FINAL ORDER

This action is a consolidated statutory appeal and petition for writ of certiorari. Petitioners Brian Young and Bradley Johnson ("Officer Young" and "Officer Johnson"; or "the officers") seek judicial review of a decision by the Milwaukee Board of Fire and Police Commissioners ("the Board") to uphold a Milwaukee Police Department disciplinary suspension. For the reasons set forth herein, this Court affirms the decision of the Board.

BACKGROUND

I. The incident triggering discipline

The events that triggered departmental discipline are largely undisputed. Officers Young and Johnson are police officers with the Milwaukee Police Department ("the Department"). On the night of April 20, 2016, the officers were assigned as partners and were on patrol with the Neighborhood Task Force Street Crimes Unit. (Tr. at 21:1-17) While driving through the area of North 9th Street and West Concordia, they saw an African American man walking in the middle of the street. (*Id.* at 22:24-23:7) This man was later identified as James Beamon. The officers decided to conduct a subject stop because they believed that Mr. Beamon was in violation of an ordinance prohibiting standing or loitering in roadways. (*Id.* at 24:18-27:03) They stopped several feet in front of Mr. Beamon, who at that point was standing approximately two and a half feet from the curb. (R-29 at 00:35; Tr. at 41:4-6)

As the officers exited the vehicle, Officer Johnson activated his body camera (Officer Young was also wearing a camera, but did not activate it). (Tr. at 24:6-11; 257:12-13) The

officers told Mr. Beamon to remove his hands from his pockets, and Mr. Beamon complied (Tr. at 43:23-44:1) The officers walked towards Mr. Beamon and told Mr. Beamon to "come here." (R-29 at 00:36) Mr. Beamon put his hands in the air and began backing up, stating, "Hey, y'all got guns." (*Id.* at 00:38) The officers continued to ask Mr. Beamon to "come here." (*Id.* at 00:40-00:42). Mr. Beamon did not comply; instead he asked the officers "for what?" and told the officers not to touch him. (*Id.*)

Officers Young and Johnson then used force, holding Mr. Beamon and attempting to push his hands behind his back. (*Id.* at 00:43-00:48) A struggled ensued: the officers tried to handcuff Mr. Beamon and make him sit on the curb. (*Id.* at 00:52-02:36) During this time the officers used obscenities and threatened use of (but did not use) a Taser. (*Id.* at 00:52-2:01) An officer asked if Mr. Beamon had marijuana or a gun, and Mr. Beamon stated that he did not. (*Id.* at 00:49-00:50) Eventually, the officers brought Mr. Beamon to the ground and handcuffed him. (*Id.* at 2:21; R-49, p. 7) The officers took Mr. Beamon into custody and issued him citations for obstructing an officer and loitering in the street. (R-2, p.4; R-69, ¶ 4)

II. Review and investigation of the officers' conduct

It is standard procedure for the Department to review any use of force by an officer. (R-49) Sergeant Gregory Sousek interviewed the officers and Mr. Beamon and watched the body camera footage. (R-38 at 6-8) He authored a Use of Force Report, which Lieutenant Kristin Felsman and Captain Leslie Thiele reviewed. (*Id.* at 5). In her review, Lieutenant Felsman noted that Mr. Beamon had already moved out of the middle of the street by the time the vehicle had approached (and by implication, was not violating an ordinance at the time of the stop). (*Id.*) Lieutenant Felsman also noted that Mr. Beamon was not trying to flee, but appeared to be backing up because he was afraid of the officers. (*Id.*) Nonetheless, the officers went "hands on" too quickly, instead of trying to deescalate the situation. (*Id.*) She concluded that the officers could have avoided using force if they had used dialogue. (*Id.*) She also found Officer Johnson's possible use of the Taser "questionable," and Officer Johnson's tactics in helping Officer Young bring Mr. Beamon to the ground "very questionable." (*Id.*) Lieutenant Felsman recommended counseling: "policy review at the least." (*Id.*)

On May 20, 2016, Sergeant Cory Strey conducted a counseling session with the officers. (R-50) The discussion was "open ended" and involved viewing and discussing the body camera footage and the stop. (Tr. at 290:13-291:6) Sergeant Strey listened to the officers' explanations

and gave them his opinions. (*Id.* at 299:1-7) Sergeant Strey and the officers also discussed the appropriate use of force. (*Id.* at 299:14-300:15)

Department rules require all Use of Force Reports to be forwarded to the Internal Affairs Department ("IAD"). (Tr. at 259:10-13) IAD independently determines whether further investigation and discipline is warranted. (*Id.* at 259:2-13) IAD initiated an investigation, and on December 2, 2016, it issued its report. (R-37) The report acknowledges that "[p]roactive encounters such as these are clearly tense moments for officers," and that the officers "clearly believed they were lawful and justified in all aspects of their contact with Mr. Beamon." (*Id.* at 3) Nonetheless, "[a]bsent specific actionable intelligence, the contact with Mr. Beamon should have been consensual . . . Professional dialogue coupled with tactical use of distance and observation would have provided for the best outcome of the contact. Instead, the officers ended up using force on and arresting an unarmed man on his way to work." (*Id.*) The report therefore determines that "there exists a preponderance of evidence to support the allegation that the conduct of Police Officers Bradley Johnson and Brian Young was contrary to Department's Code of Conduct and Standard Operating Procedures." (*Id.* at p.3)

III. Initial discipline

On April 25, 2017, Department Chief Edward Flynn took formal disciplinary action against the officers. (R-43; R-44) The complaint against the officers charges them with violating "Core Value 1.00 – Competence . . . Referencing Guiding Principle 1.05 . . . Referencing Standard Operating Procedures . . . Section 085.10." (R-43, pp.1-2; R-44, pp.1-2). Core Value 1.00 states:

> We are prudent stewards of the public's grant of authority and resources. We are accountable for the quality of our performance and the standards of our conduct. We are exemplary leaders and exemplary followers.

(R-43, p.1) Guiding Principle 1.05 states:

> All department members shall be familiar with department policy, procedures and training and shall conduct themselves accordingly.

(*Id.*) Standard Operating Procedure ("SOP") Section 85.10 governs protocol for initiating contact with a member of the public. (*Id.* at pp.2-4) It requires that "[t]o the extent that safety considerations allow, police members will introduce themselves to all citizens they make contact with . . . The introduction shall occur as early in the contact as safety permits and will be given

prior to the police member's request for identification . . . from the citizen being contacted." (*Id.* at pp.2-3)

The complaint includes a brief overview of the stop and the subsequent interviews with the officers. (*Id.* at pp.4-5; R-44, pp.4-5) It concludes that the officers "failed to adhere to Department policy regarding Contact Protocol." (R-43, p.5; R-44, p.5) It orders the officers suspended for fifteen working days without pay unless they appeal the disciplinary action. (R-43, p.7; R-44, p.7) The officers appealed, and their cases were consolidated. (R-3; R-8)

IV. Board hearing and decision

a. Phase I

The Board held the officers' appeal hearing on December 19 and 20, 2017. The Board heard testimony from numerous witnesses, including the officers, and also watched the body camera footage. The testimony that is relevant to this decision is summarized below.

Both officers testified. Officer Johnson testified that he was initially concerned that Mr. Beamon had a weapon, because Mr. Beamon's hands were in his pocket. (Tr. at 43:15-22) He further stated that once he began talking with Mr. Beamon, he became concerned that Mr. Beamon was going to flee. (*Id.* at 46:10-47:04) Because of this worry, and because Mr. Beamon was uncooperative and talking over the officers, Officer Johnson felt that he did not have time to follow normal contact protocol. (*Id.* at 51:11-17; 62:22-65:08) That standard "REACT" protocol emphasizes verbal communication to gain voluntary compliance. (*Id.* at 62:22-65:08) Instead, Officer Johnson used the "DONE" protocol, which permits use of physical force. (*Id.* at 83:20-86:04) Officer Johnson testified that he did not believe that this level of force was excessive. (*Id.* at 48:19-49:01) Officer Young's testimony was similar to Officer Johnson's. Like Officer Johnson, Officer Young testified that he believed he handled the encounter appropriately. (*Id.* at 122:15-22)

The Board heard testimony on use of force. Sergeant Allen Groszczyk testified; as range master for the Department, Sergeant Groszczyk oversees training on use of force. (*Id.* at 142:05-20) Sergeant Groszczyk testified that the officers deviated from contact protocol by not maintaining distance between themselves and Mr. Beamon. (*Id.* at 146:20-147:16) This made it more difficult for the officers to comply with the introduction protocol. (*Id.*) The officers called Jose Alba, a retired police academy instructor, to refute this testimony. Mr. Alba disagreed with Sergeant Groszczyk's opinion and testified that the officers followed protocol. (*Id.* at 213:1-8)

He noted that there is no requirement that officers maintain a certain distance during a field interrogation. (*Id.* at 228:11-229:20)

Several of the officers' superiors testified to the events following Mr. Beamon's arrest. Sergeant Sousek testified that the officers handled the stop appropriately, that safety concerns justified deviating from standard protocol, and that the officers could have used (but were not required to use) other methods. (*Id.* at 280:19-286:24; 287:5-20) Sergeant Strey testified that the officers might have used too much restraint for a pedestrian violation, but that they did so because Mr. Beamon was being resistive. (*Id.* at 299:14-300:15) Lieutenant Christopher Schroeder, who investigated the incident and wrote the IAD report, testified that IAD can investigate and recommend charges even after a counseling session has taken place. (*Id.* at 177:13-178:1; 189:18-24; 190:8-14) Inspector (then Captain) Thiele testified that the officers became physical too quickly, and could have avoided force by using dialogue. (*Id.* at 264:11-256:6) She explained that she recommended counseling and not formal discipline because disciplinary proceedings can take years; in any case, she felt that counseling, as a non-punitive alternative, was sufficient. (*Id.* at 256:8-10; 257:7-17; 269:7-270:1) She testified that even after a recommendation is made to counsel officers, IAD is still free to investigate and recommend discipline. (*Id.* at 258:19-259:13)

Following this and other testimony, the Board unanimously determined that Officers Johnson and Young violated the Department's Code of Conduct as charged, and that the first five "just cause" standards were satisfied by a preponderance of the evidence. (*Id.* at 323:13-19; *see infra*, "Standard of Review," for a discussion of the "just cause" factors) The hearing then moved to Phase II.

b. Phase II

The second portion of the hearing examined the last two "just cause" factors: whether the chief is applying the rule or order fairly and without discrimination; and whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the department. *See infra*, "Standard of Review." During this portion, Police Chief Edward Flynn testified. To determine the officers' discipline, Chief Flynn testified that he met with IAD and his other staff, discussed the case, and reviewed written materials and the body camera video. (*Id.* at 326:3-21) He considered the officers' performance records and intent, and looked at the degree of harm that resulted from the encounter. (*Id.* at 326:22-327:14)

Chief Flynn testified that he agreed with IAD's recommendation. (*Id.* at 326:15-21) He noted that the officers were hard-working and thought of well by supervisors. (*Id.* at 327:15-19) He felt that the officers had good intentions. (*Id.* at 327:24-328:10) Nonetheless, he determined that the degree of harm was significant, and that given their experience and training, the officers should not have acted as they had. (*Id.* at 328:11-331:13) Chief Flynn concluded that the officers escalated the incident without reasonable suspicion to justify their tactics. (*Id.*) He further noted that such behavior erodes the community's trust in the Department, making it more difficult to safely police those areas. (*Id.* at 331:14-332:12)

Following other testimony, the Board unanimously concluded that the discipline should be sustained, and that for the good of the service Officers Young and Johnson should be suspended for fifteen working days without pay. (*Id.* at 394:8-16). It also waived Fire and Police Commission Rule XVI(10)(f), which requires a written decision to be signed by participating Board members within ten days of an oral decision. (*Id.* at 394:17-19)

The Board issued its written decision on January 25, 2018 and issued a corrected written decision on January 30, 2018. (R-67; R-69)

STANDARD OF REVIEW

In Wisconsin, a police officer may challenge a disciplinary decision in two ways: a common-law certiorari appeal and a statutory appeal pursuant to Wis. Stat. § 62.50. These appeals may be sought simultaneously, in which case, the circuit court may decide which appeal to address first. *State ex rel. Heil v. Green Bay Police and Fire Comm'n*, 2002 WI App 228, ¶ 1, 256 Wis. 2d 1008, 652 N.W.2d 118.

I. Standard of review for a common-law certiorari appeal

A writ of certiorari "review[s] legal defects in the administrative record for which there is no statutory judicial review." *State v. Goulette*, 65 Wis. 2d 207, 214, 222 N.W.2d 622 (1974). Thus when the court is simultaneously considering a statutory appeal pursuant to Wis. Stat. § 62.50, certiorari review is limited to (1) whether the Board kept within its jurisdiction, and (2) whether the Board proceeded on a correct theory of law. *Gentilli*, 2004 WI 60, ¶ 21. On certiorari review, there is a presumption that the commission acted according to the law and that the decision reached was correct. *State ex. rel. Ruthenberg v. Annuity and Pension Bd. of the City of Milwaukee*, 89 Wis. 2d 463, 473, 278 N.W.2d 835 (1979).

The court employs separate standards to review agency findings of fact and conclusions of law. When reviewing findings of fact, the court cannot assess the weight and credibility of the evidence. *Id.* This means that the court shall sustain the agency's findings of fact "if any reasonable view of the evidence supports them." *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 37, 53, 332 Wis. 2d 3, 796 N.W.2d 411. When analyzing a question of law, a court exercises independent judgment, although it gives persuasive "due weight" to an administrative agency's experience, technical competence, and specialized knowledge. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 493, 914 N.W.2d 21; *see also Wisconsin Dep't of Workforce Dev. v. Wisconsin Labor & Indus. Review Comm'n, et al*, 2018 WI 77, ¶ 4 n.4, 382 Wis. 2d 611, 914 N.W.2d 625; Wis. Stat. § 227.57(10). When considering the persuasive value of due weight, a court analyzes factors such as (1) whether the agency is responsible for administering a statute, (2) the duration of the interpretation, (3) the extent to which the agency used its expertise, and (4) whether the interpretation enhances the consistency of law. *Tetra Tech EC, Inc.*, 2018 WI 75 at ¶ 79.

II. Standard of review for a statutory appeal pursuant to Wis. Stat. § 62.50

Wis. Stat. § 62.50 limits the circuit court's review to the question: "Under the evidence is there just cause . . . to sustain the charges against the accused?" Wis. Stat. § 62.50(21). Seven enumerated factors encompass the "just cause" standard:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under [factor 3] was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Id.

In evaluating whether there was just cause for the Board's actions, judicial review is limited to determinations of "the sufficiency of the evidence and the relationship between the discipline imposed and the seriousness of the conduct justifying the discipline." *Gentilli v. Bd. of the Police and Fire Comm'rs of the City of Madison*, 2004 WI 60, ¶ 34, 272 Wis. 2d 1, 17, 680 N.W.2d 335. Thus the circuit court's role is to ensure that "the Board's [just cause] decision is supported by the evidence that the Board found credible." *Younglove v. City of Oak Creek Fire & Police Comm'n*, 218 Wis. 2d 133, 139, 579 N.W.2d 294 (Ct. App. 1998). The court must defer to the Board's factual findings and witness credibility determinations, and may not substitute its judgment for that of the Board. *Id.* at 138-141. The question is not "whether the court would decide the same way upon the evidence, but simply whether the board had performed its statutory duty." *Clancy v. Bd. of Fire & Police Comm'rs of Milwaukee*, 150 Wis. 630, 636, 138 N.W. 109 (1912).

ANALYSIS

I. Certiorari appeal

The officers present a number of arguments on certiorari appeal. These are addressed below.

a. Due process violations

The officers make two separate but related due process arguments, centering on lack of notice of the charges brought. The crux of the officers' argument is that the complaint consists of a single charge: failure to adhere to department policy regarding contact protocol (specifically, failure by the officers to immediately identify themselves or communicate the reason for the stop). In its opening statement at the hearing, however, Chief's counsel argued that there was "a more general violation": the officers failed to act in a "courteous, professional and lawful" manner. (*Id.* at 10:19-24) In addition, throughout the hearing, there were repeated statements concerning whether the stop was lawful. According to the officers, the Board ultimately found that the officers conducted an illegal stop, "amongst other things." *Plaintiff's Brief*, p.11. Therefore, the officers argues, they were not given notice of the charges that were brought against them. Since due process includes notice of all charges against the accused, the officers were denied due process. As such, the officers conclude, the Board both acted on an incorrect theory of law (because it deprived the officers of their property interest in continued

employment, without due process) and it acted outside its jurisdiction (because it did not have jurisdiction to consider charges not listed in the complaint).

The Fourteenth Amendment of the United States Constitution prevents the state from depriving a person of life, liberty or property without due process of law. *Ass'n of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 557, 544 N.W.2d 888 (1996). To establish a due process violation, one must show that one had a property interest and that one was deprived of this interest without due process. *Id.* at 557-58. The Constitution does not create property interests, however, and to determine whether a person has a property interest in employment, one looks to state laws. *Vorwald v. School Dist. of River Falls*, 167 Wis. 2d 549, 556-57, 482 N.W.2d 93 (1992) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972)). Wisconsin Statute Section 62.50, governing police and fire departments in first class cities, is one such law. *See Vorwald*, 167 Wis. 2d at 557 (reasoning that "[d]ue to the protection afforded them by [Section 62.50], the police officers . . . had property interests in their employment). When a person has a property interest in continuing employment, due process requires an opportunity for a hearing prior to being deprived of that interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487 (1985). The employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

Had the Board considered or decided additional charges, this would implicate the officers' due process rights, because the officers would not have been given notice of those charges. As the Board rightly points out, however, there is no evidence that the Board considered or made its decision based on additional charges. It is true that Chief's counsel argued that the officers "did not conduct themselves to advance the mission of the police department and . . . they were not courteous, professional and lawful." (Tr. at 11:2-5) It is also true that the written decision considers the context of the stop, including the behavior of the officers, in addition to the specific violation (the officers' not introducing themselves or communicating the reason for the stop). This does not, however, mean that the officers were not given notice of the charges. The actual charge against the officers in the complaint is "fail[ing] to adhere to Department policy regarding Contact Protocol." (R-43, p.5; R-44, p.5) That contact protocol (SOP Section 85.10) is reproduced in the complaint; it states that "the goal of the department is that each contact be conducted in a courteous, professional and lawful manner." (R-43, p.2; R-44, p.2) The

complaint goes on to detail the full encounter with Mr. Beamon. (R-43, p.4-5; R-44, p.4-5) Therefore, the complaint clearly puts the officers on notice that their conduct during the entire encounter is at issue, insofar as it violates SOP Section 85.10.

Officers Young and Johnson further allege that the Board found that the stop was unlawful. Were this true, then Petitioners should have been given notice of that separate charge. There is no evidence, however, that Board considered the lawfulness of the stop during the hearing. It is true that Chief's council raised the issue; however, the hearing examiner halted this line of argument, stating multiple times that the stop was lawful. (Tr. at 33:19-24; 250:18-20) More important, there is no evidence that the Board ultimately found that the officers conducted an unlawful stop. Contrary to the officers' assertion, the written decision contains no discussion whatsoever of an unlawful stop. The decision focuses entirely on the officers' actions (and the consequences of those actions) once the stop already occurred.

The Court concludes that the Board did not violate the officers' due process rights.

b. Void for vagueness challenges

Officers Young and Johnson make several related arguments concerning the fairness of holding them to the standards of Core Value 1.00, Guiding Principle 1.05, and SOP Section 85.10. First, the officers argue that the Board found that they violated Core Value 1.00 and Guiding Principle 1.05. According to the officers, however, these rules are unconstitutionally vague because they outline broad standards, leaving one to guess whether the rules apply to specific conduct. Second, the officers argue that SOP Section 85.10 ("Contact Protocol") is unconstitutionally vague. This is because the introductory portion of SOP Section 85.10 ("Citizen Contacts, Field Interviews, Search and Seizure") states that "[t]he purpose of this policy is to provide general guidance for enforcement actions. . ." (R-34, pp.1, 3) The officers reason that "[s]ince [SOP Section 85.10] is only meant for general guidance, it's wholly unclear how one violates it." *Petitioner's Brief*, p.15. For the above arguments, the officers do not indicate whether the Board, in applying these rules, acted outside its jurisdiction or proceeded on an incorrect theory of law. Finally, the officers argue that they were charged with not "immediately" stating their name or the reason for the stop. SOP Section 85.10, however, does not require immediate introductions, but states only that "[t]o the extent that safety considerations allow, police members will introduce themselves to all citizens they make contact

with." (R-34, p. 3) Therefore, "[t]he Board . . . exceeded its jurisdiction by holding the Officers to a standard that does not exist." *Petitioner's Brief*, p.17.

Due process requires that an administrative rule concerning governmental employment cannot be so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *State ex rel. Kalt v. Bd. of Fire & Police Comm'rs for City of Milwaukee*, 145 Wis. 2d 504, 510, 427 N.W.2d 408 (Ct. App. 1988). At its root, the vagueness doctrine concerns fairness. *Id.* A rule must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294 (1972). In considering whether a Department rule is unconstitutionally vague, "it is necessary to examine whether the rule creates a standard of conduct which is capable of objective interpretation by those policemen who must abide by it, by those Departmental officials who must enforce it, and by any administrative or judicial tribunal which might review any disciplinary proceeding." *Kalt*, 145 Wis. 2d at 510.

The officers' vagueness arguments are unpersuasive. First, the Board did not find that the officers violated Core Value 1.00 and Guiding Principle 1.05. Rather, the decision makes clear that Petitioners violated SOP Section 85.10: it does not discuss general standards of behavior but rather the specific ways that the officers disregarded contact protocol. The Board rightly points out that Core Value 1.00 and Guiding Principle 1.05 are merely the rules that require the officers to abide by SOP Section 85.10, and do not represent separate violations. Second, there is no reason why the introductory language in SOP Section 85.10 renders the specific rules that follow unenforceable. The Board is correct in that the officers can point to no case or example to support this assertion. SOP Section 85.10 is detailed and clear; it is obvious from its face that it lays out objective standards of conduct for making contact with the public.

Finally, it is true that the complaint states that the officers did not "immediately" state their name or the reason for the stop. (R-43, p.4-5; R-44, p.4-5) The Board's decision, however, does not apply any "immediate" standard to judge the propriety of the officers' conduct. Instead, it is clear that throughout the decision, the Board considers whether the officers acted pursuant to SOP Section 85.10; that is, whether they made introductions to the extent that safety considerations allowed. As just one example, in determining "whether the rule or order the subordinate allegedly violated is reasonable," the decision finds that:

> [T]he contact protocol requires officers to introduce themselves to all citizens with whom they have contact . . . The protocol specifically states, "to the extent safety considerations allow," officers are to state their name, rank, affiliation with the MPD, and the reason for the stop. The protocol requires that the introduction be made "as early in the contact as safety permits," and requires that it be given prior to the officer's request for identification.

(R-69, ¶ 13) In short, there is no evidence that the Board exceeded its jurisdiction by holding the officers to a "standard that does not exist."

c. Lapse in the Board's jurisdiction

When it made its decision, the Board also waived Fire and Police Commission Rule XVI(10)(f). (*Id.* at 394:17-19) That rule provides that "[a] written decision will be signed by Board members who participated in the decision within ten (10) days after such decision is rendered. . ." FPC XVI(1)(f) (2009). Under a separate rule, Rule IV(5), "[t]he Board may, by a vote of two-thirds of those present and voting, but in no event by less than a majority of the Board, vote to suspend or waive any of its Rules. . ." Three Board members were present and voted at the hearing, out of six total members. Because that group constitutes half of the Board, however, a majority of Board members did not technically vote to waive Rule XVI(10)(f). Officers Young and Johnson argue because the Board did not waive the Rule, it was required to issue its written decision within ten days. The officers reason that Rule XVI(10)(f) is mandatory, and that after the ten-day mark, the Board lost its jurisdiction to issue its decision. The Board responds that this rule is directory, not mandatory; that is, the rule is instructive but of no obligatory force, and triggers no consequences if disregarded.

Interpretation of an administrative rule is a question of law that a court reviews de novo. *Trott v. Wisconsin Dept. of Health & Human Servs.*, 2001 WI App 68, ¶ 4, 242 Wis. 2d 397, 626 N.W.2d 48. The court, however, "generally give[s] great weight deference to an agency's interpretation of its own rules unless it is inconsistent with the language of the regulation or clearly erroneous," or unless "the agency has no special experience determining an issue or it is completely a question of first impression." *Krusczek v. Wisconsin Dept. of Workforce Dev.*, 2005 WI App 12, ¶ 12, ¶ 12 n.3, 278 Wis. 2d 563, 692 N.W.2d 286.

Where a regulation specifies a time period for an agency action, such time limits "are directory unless the [regulation] denies the exercise of power after such time or the nature of . . . the [regulatory] language shows the time was meant to be a limitation." *Id.* at ¶ 14. On the other

hand, use of the word "shall" typically creates a presumption that the time limit is mandatory. *Id.* at ¶ 13. In determining whether a regulation is mandatory or directory, in addition to the above considerations the court will consider the regulation's history and purpose; whether there is a penalty for violating the time limit; and the consequences of an alternate interpretation (including injury to a party). *Id.* at ¶14; *see also Karow v. Milwaukee Cnty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 571-73, 263 N.W.2d 214.

It is unclear whether the Board has "special expertise" in this matter or whether this is a question of first impression. In any case, even under strict de novo review, all of the above considerations favor treating the time limit in Rule XVI(f)(10) as directory. As a preliminary consideration, the Rule uses the language "will," and not the stronger language, "shall." This could indicate that the time limit is presumed directory. In any case, even if the language "will" triggers a presumption that the language is mandatory, that presumption is rebutted by the considerations outlined below.

First, the rule does not deny the Board the power to issue a decision after ten days. Nor does the Rule purport to limit the Board's jurisdiction. In considering the Rule's history and purpose, we look to the enabling statute, Wisconsin Statute Section 62.50. That Statute does not require a timeline for the Board to issue a written decision. *See* 62.50(17)(a) (stating only that "the decision and findings of the board, or panel, shall be in writing and shall be filed, together with a transcript of the evidence, with the secretary of the board."). In addition, there is no penalty for violating the time limit.

Finally, any injury to the officers from the delay is not severe enough to warrant finding the time limit mandatory. The officers rely heavily on *Karow* to support their assertion that a possible delay in Officer Young's promotion, pending the outcome of this litigation, is sufficient injury to trigger a "mandatory" finding. In *Karow*, however, the time limit was deemed "mandatory" because the delay forced an employee to continue on unpaid suspension. *Karow*, 82 Wis. 2d at 573. Similar reasoning led to upholding a time limit for holding a forfeiture hearing, where a car owner was denied his property in the interim. *State v. Rosen*, 72 Wis. 2d 200, 208, 240 N.W.2d 168 (1976). These are significant injuries that implicate property interests. The time limits in those cases also concerned when the hearing was to occur, and not when the formal written decision was to be issued. Here, Officer Young may have had to wait an extra month to

appeal the Board's oral decision, but on the balance, this injury in of itself does not warrant a finding that the time limit is mandatory.

Because the Court finds that the ten-day time limit is directory and not mandatory, it will not consider the proper remedy, if any, for the Board's issuing a decision outside that time limit.

d. Bias against the officers

The officers next argue that the Board proceeded on an incorrect theory of the law when it denied the officers their due process right to a fair trial by fair and impartial decisionmakers. The officers explain that "[a]t its core, this case boils down to how two (2) Caucasian officers treated a younger African-American." *Plaintiffs Brief*, p.20. Fred Crouther (of the three Board members), however, is a "pillar of the African-American community" who has spoken out against discriminatory stops and searches, has ties to the American Civil Liberties Union, and "felt he could mend the rift between the African-American community and the Department." *Id.* Because of his community ties, and because "[Dr. Crouther] felt he was needed on the Board to fix how Caucasian officers were treating African-Americans," Dr. Crouther was "psychologically wedded to a predetermined outcome in favor of African-Americans." *Plaintiff's Brief*, pp.20-21. As such, Dr. Crouther's "'bias in fact' and/or 'risk of bias' was too great to allow him to adjudge the Officers." *Plaintiffs Brief*, p.2. Put another way, the officers argue that Dr. Crouther's participation in the hearing and decision denied them their due process right to a fair trial.

In making this argument, the officers reference numerous materials outside the record, contained in a separate affidavit. The Board argues that this is improper, and that the Court cannot examine extraneous material. As a threshold matter, therefore, the Court must determine whether it can rightly consider the information about Dr. Crouther. As a general rule, on both statutory and common-law certiorari review, a court is confined to the record. *State ex. Rel. Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment*, 131 Wis. 2d 101, 119, 388 N.W.2d 593 (1986); *see also* Wis. Stat. § 62.50 ("The action shall be tried by the court without a jury and shall be tried upon the return made by the board."). In cases involving alleged bias, however, "the public policy of promoting confidence in impartial tribunals may justify expansion of the certiorari record." *Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App. 111, ¶ 42, 243 Wis. 2d 538, 648 N.W.2d 878. Before authorizing such expansion, though, "the party alleging bias must make a prima facie showing of wrongdoing." *Id.* This inquiry overlaps with

an analysis as to whether the Board proceeded on an incorrect theory of the law. *See infra.* Therefore, the Court will pause this inquiry and consider the central question: whether the officers can demonstrate either bias in fact or an impermissible risk of bias on the part of the Board.

In determining whether a tribunal proceeded on a correct theory of law, the term 'law' "refers not only to the applicable statutes but also to the guaranties of due process found in the state and federal constitutions." *Donaldson v. Bd. of Comm'rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶ 79, 272 Wis. 2d 146, 680 N.W.2d 762 (citations omitted). Due process requires a "fair trial in a fair tribunal," regardless of whether the adjudication is before an administrative body or a court. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456 (1975). "A minimal rudiment of due process is a fair and impartial decisionmaker." *Marder v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2005 WI 159, ¶ 27, 286 Wis. 2d 252, 706 N.W.2d 110 (citation omitted).

A court must presume that those serving as adjudicators in administrative proceedings do so with honesty and integrity. *Bunker v. Labor and Indus. Review Comm'n*, 2002 WI App 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864. A "strong showing is necessary to rebut this presumption." *Nu-Roc Nursing Home, Inc. v. Dept. of Health and Social Services*, 200 Wis. 2d 405, 420, 546 N.W.2d 562 (Ct. App. 1996). However, where the adjudicator in an administrative proceeding exhibits bias in fact, or where the risk of bias is impermissibly high, the administrative decision can violate due process. *Id.* at 415-16. A plaintiff can demonstrate an impermissibly high risk of unfairness or bias by presenting special facts and circumstances which show that the adjudicator has become "psychologically wedded" to a predetermined disposition of the case. *Id.* at 420 (citations omitted); *Guthrie v. Wisconsin Employment Relations Comm'n,* 111 Wis. 2d 447, 454, 331 N.W.2d 331, 335 (1983).

This Court finds that the officers cannot overcome the presumption that Dr. Crouther served with honesty and integrity. None of the evidence presented to the Court demonstrate that Dr. Crouther is either "biased in fact" or "psychologically wedded" to ruling against the officers. The officers have presented a number of facts about Dr. Crouther, but these merely indicate that Dr. Crouther welcomed his appointment to the Board as a step towards improving police relations with the African-American community. The officers present no evidence that Dr. Crouther is biased against Caucasians, Caucasian officers, or Officers Young and Johnson in particular. The Board rightly points out that this argument is "nothing short of embarrassing."

The Court finds that the officers cannot show that the Board denied the officers their due process right to fair and impartial decisionmakers.

e. Employment double jeopardy

The officers' next claim rests in the doctrine of employment double jeopardy. Under that doctrine, "once employment discipline for a given offense is imposed and accepted," with the "understanding . . . that it is a final disciplinary sanction," the punishment "cannot thereafter be increased, nor may another punishment be imposed." *Petitioner's Brief*, p.21. The officers argue that their counseling session meets those conditions: it was disciplinary (in that it was "intended to correct or instruct"), and all parties believed the counseling session to be the end of the matter. *Id.* Therefore, the Board cannot impose additional punishment in the form of suspension without pay.

The Board argues that the doctrine of employment double jeopardy does not exist in Wisconsin. The Board rightly points out that the officers' argument is based on arbitration decisions, Louisiana case law, and Wisconsin case law concerning double jeopardy in the criminal context. *See, e.g.*, *State v. Carpenter*, 197 Wis. 2d 252, 271-72, 541 N.W.2d 105 (1995) (holding that statute creating civil commitment procedure for convicted sexual offenders did not violate the double jeopardy clauses of the Wisconsin and United States constitutions); *City of Oshkosh v. Winkler*, 206 Wis. 2d 538, 545-56, 557 N.W.2d 464 (Ct. App. 1996) (overturning dismissal of prosecution and holding that university's discipline against student did not trigger double jeopardy protection). The Court could not locate a Wisconsin decision analyzing employment double jeopardy, so it does not appear that appellate courts have expressly adopted this doctrine. Therefore, the Court could merely decline to apply the doctrine to the present case. The Board considered the issue in its written decision, however, and the parties dispute the factual basis for applying the doctrine. For the parties' benefit, therefore, the Court will briefly explain why employment double jeopardy does not preclude suspending the officers without pay.

In order for employment double jeopardy to attach, an employee must undergo discipline, and the parties must consider that a final disciplinary sanction. *See Petitioner's Brief*, p.21, *citing* Elkouri & Elkouri, HOW ARBITRATION WORKS (6th ed. 2003). First, it is unlikely that a counseling session could be considered discipline. The Board determined that "counseling sessions in general and the counseling session in this case do not fit into the conventional definition of discipline" because there was no "affirmative act of punishment" and no "official

finding of misconduct." (R-69, ¶ 19) The Court gives "great weight" deference to this finding, because it relies on the Board's specialized understanding of the Department's internal disciplinary process. *See Krusczek*, 2005 WI App 12, ¶ 12, ¶ 12 n.3. In addition, Inspector Thiele, who signed off on the counseling recommendation, testified that counseling is non-punitive. The officers argue that a counseling session should be considered disciplinary because it was documented in their personnel file. If this is the only consequence arising out of the counseling session, however, then this consideration is not sufficient to overcome the "great weight" presumption that the counseling session was instructive, not punitive. Second, both Lieutenant Schroeder and Inspector Thiele testified that IAD has the authority to investigate and recommend charges, notwithstanding the fact that a counseling session was recommended or carried out. In her capacity as Captain, now-Inspector Thiele was a party to the decision to counsel the officers. Therefore, it is clear that not all of the parties involved considered this matter a final disciplinary sanction.

For these reasons, even if Wisconsin recognized employment double jeopardy, the doctrine does not apply to the present case.

II. Statutory appeal

The officers argue that the Board did not prove any of the seven "just cause" factors by a preponderance of the evidence. The Court addresses their arguments below.

a. "Just cause" standard one: Could the subordinate reasonably be expected to have knowledge of the probable consequences of the alleged conduct?

The first "just cause" standard asks whether the subordinate could reasonably be expected to have knowledge of the probable causes of the alleged conduct. The Board determined that this standard was met because "[t]he officers could reasonably be expected to know that unnecessarily escalating a pedestrian stop into an arrest requiring force and the drawing of a Taser would have an adverse effect on the person stopped and the public's perception of the department." (R-67, ¶ 12) The officers argue that the Board should have considered only whether the officers could have reasonably anticipated that their conduct would have led to the discipline imposed (fifteen days' unpaid suspension). *Petitioner's Brief*, p.25. The officers, however, present no support for their assertion that the Board should interpret the phrase "probable consequences of the alleged conduct" in such a narrow fashion. This Court finds that the Board properly considered whether the officers could have had knowledge of all the probable

consequences of their conduct. In addition, this Court finds that the Board had sufficient evidence to determine that the officers should have been aware of the effects of escalating the encounter, based on the officers' training and the circumstances of the stop. There is credible evidence to support this just cause determination.

b. "Just cause" standard two: Is the rule or order that the subordinate allegedly violated reasonable?

The second "just cause" standard asks whether the law violated is reasonable. SOP Section 85.10 requires officers to introduce themselves, so that "each contact be conducted in a courteous, professional and lawful manner." (*Id.* at ¶ 13) By qualifying this requirement ("as early in the contact as safety permits"), however, SOP Section 85.10 also recognizes that officers may dispense with protocol when safety is at issue. (*Id.*) Because SOP creates a reasonable standard but also allows for exceptions, the Board determined that it had "no difficulty concluding" that SOP Section 85.10 was reasonable. (*Id.*) The Court finds that by analyzing of Core Value 1.00, Guiding Principle 1.05, and SOP Section 85.10 in this manner, the Board carried out its statutory duty to base its just cause finding on credible evidence.

c. "Just cause" standard three: Did the chief, before filing the charge against the subordinate, make a reasonable effort to discover whether the subordinate did in fact violate the rule or order?

The third "just cause" standard asks whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order. The Board considered the record of the Department's investigation, including "the Incident Report . . . the memorandum of Sgt. Christopher Schroeder. . . the memorandum of Lt Timothy Leitzke . . . and the officers' memorandums responding to the charges" to determine that the Chief made a reasonable effort to determine that the officers violated SOP Section 85.10 prior to imposing discipline. (*Id.* at ¶ 14) The Court finds that this constitutes sufficient evidence, and that the Board performed its statutory duty on this point.

d. "Just cause" standard four: Was this effort fair and objective?

The fourth "just cause" standard asks whether the chief's "reasonable effort" under just cause standard three was fair and objective. The Board reviewed "the entire record in this matter" and found "no evidence of any animus directed against either Officer Johnson or Young." (*Id.* at 15) This Court finds that there is sufficient credible evidence within the record to

support this finding, since none of the evidence before the Board points to an unfair targeting of the officers.

e. "Just cause" standard five: Did the chief discover substantial evidence that the subordinate violated the rule or order?

The fifth "just cause" standard asks whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges. In determining that this standard was met, the Board considered multiple pieces of evidence, including the body camera footage, the Use of Force Report, and testimony from the hearing. (*See id.* at ¶ 21) Therefore, it is simply untrue that, as the officers claim, "there is still no (credible) evidence that the Officers violated SOP Section 85.10." *Plaintiff's Brief*, p.27. The Court finds that there is sufficient credible evidence to uphold the Board's finding of just cause standard five.

f. "Just cause" standard six: Did the chief apply the rule or order fairly and without discrimination?

The sixth "just cause" standard asks whether the chief applied the rule or order fairly and without discrimination against the subordinate. The Board determined that "a thorough investigation was conducted with no . . . credible evidence of comparable disciplines presented that would dissuade the Commission from upholding the fifteen day suspensions." (*Id.* at ¶ 22) The officers counter that discipline was issued in a discriminatory manner. They point to evidence before the Board showing that in another disciplinary manner, an officer displayed worse behavior and received less punishment. The officers argue that in their case, however, the Board chose to impose severe discipline, because it was reacting to a recently-settled lawsuit challenging Milwaukee's stop-and-frisk practices. *Plaintiff's Brief*, pp.30-34.

It is true that the Board heard evidence of another officer's discipline. The Board also heard Chief Flynn's opinion, however, that the situation involving that other officer "was not a comparable incident." (Tr. at 357:24-358:6) Nor is there any evidence that the Board upheld the recommended discipline because it was concerned about the implications of a separate lawsuit. Instead, there is sufficient evidence for the Board to conclude that the chief applied the rule fairly and without discrimination. The Board heard evidence from Chief Flynn that he reviewed all materials, met with IAD, and searched for but could not find information on a comparable incident to provide specific guidance. (*Id.* at 326:3-21; 332:13-334:6) Chief Flynn also outlined how he arrived at the punishment he ordered, considering mitigating factors but also the harm

caused to Mr. Beamon and the Department. (*Id.* at 326:22-332:12; 334:7-335:23) This evidence is sufficient to support the Board's finding that just cause standard six is met.

g. "Just cause" standard seven: Did the proposed discipline reasonably relate to the seriousness of the alleged violation and to the subordinate's record of service?

"Just cause" standard seven asks whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department. Here the officers reiterate their argument that they were disciplined for failing to use restraint and for conducting an illegal stop. *See* Section I.a of Analysis; *Petitioner's Brief*, pp.35-36. The whole of the Board's decision makes clear, however, that it considered whether the discipline reasonably related to the officers' violation of SOP Section 85.10. *See* Section I.a of Analysis. The Board also laid out the evidence it considered in determining that this standard was met: it considered the chief's testimony of the officers' positive records of service, but also the harm resulting from the incident. (R-67, ¶ 23) As such, the Board performed its statutory duty.

CONCLUSION

Based upon a review of the record and the arguments of the parties, and for the reasons outlined above, the Court finds that the Board kept within its jurisdiction, proceeded on a correct theory of law, and satisfied "just cause" in its decision ordering Officers Young and Johnson suspended from the Department for fifteen working days without pay. Accordingly, that decision is hereby AFFIRMED.

Dated this 20th day of March 2019, in Milwaukee, Wisconsin.

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

BY THE COURT:

William Sosnay

Honorable William Sosnay
Milwaukee County Circuit Court Judge

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL.